MOTION FILED
FEB 1 199

No. 90-1039

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PEER INTERNATIONAL CORPORATION,
On Behalf Of Itself And All Others Similarly Situated,

Petitioner,

v.

PAUSA RECORDS, INC. and JACK NEWMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., IN SUPPORT OF PETITIONER

CHARLES J. SANDERS
(Counsel of Record)
NATIONAL MUSIC
PUBLISHERS' ASSOCIATION, INC.
205 East 42nd Street
New York, New York 10017
(212) 370-5330

Attorney for National Music Publishers' Association, Inc.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

National Music Publishers' Association, Inc. ("NMPA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case in support of the Petition for Certiorari filed by petitioner Peer International Corporation. The consent of the attorney for the petitioner has been obtained. The attorney for the respondents has represented that while he would like to consent to the filing of this brief, he cannot, because there is no person available to authorize him to act on behalf of the respondents. 1/

NMPA is the principal trade association representing music publishers in the United States. In addition, NMPA is the corporate parent of The Harry Fox Agency, Inc. ("Fox"), which serves as agent for more than 7800 music publishers, and by proxy tens of thousands of American songwriters and composers, for the purpose of issuing and enforcing licenses for the making and distribution of recordings of copyrighted musical compositions.

The Ninth Circuit's decision holds that music publishers, by using the industry's standard form of license which varies certain terms of the statutory compulsory license for the convenience of record companies, forfeit the statutory infringement remedies otherwise available for breaches of the compulsory license. The issue presented by this case is one which vitally affects NMPA's members and the publisher clients of Fox, since the decision casts doubt on the enforceability of approximately two million licenses using the industry standard form. NMPA asks to file this brief to provide the Court with additional information regarding the effect of the Ninth Circuit's decision on the music industry, and particularly on the ability of music publishers to collect royalties for the recording of their copyrighted compositions.

1/ Counsel for the respondents has represented that respondent Jack Newman has died, and that he knows of no living officer or representative of the other respondent, Pausa Records, Inc., whose chief executive officer was Mr. Newman.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases — Pages(s)

Joy Music, Inc. v. *Seeco Records, Inc.*
166 F. Supp. 549 (S.D.N.Y. 1958) 4

Statutes

17 U.S.C. § 115 ..... 3, 4

17 U.S.C. §§ 115, 501–05 4

Other

Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary
90th Cong., 1st Sess. 526 (1967) 6

INTEREST OF *AMICUS CURIAE*

National Music Publishers' Association, Inc. ("NMPA") is the principal trade association representing music publishers in the United States.[1/] Its 388 members own copyrights in musical compositions granted to them by songwriters and composers, and also administer additional copyrights owned by the creators. These members, and their subsidiaries and affiliates, own or administer at least 60% of the copyrights granted by the United States in musical compositions.

NMPA members are involved in all phases of the promotion and exploitation of copyrighted songs, including discovery of new songwriters, adaptation of musical compositions, and promotion and negotiation of licenses with record companies and other users. They also play an important role in the creative process. The copyrights administered by NMPA members include compositions in all musical styles, ranging from classical to jazz to rap. Royalties collected by NMPA members are nearly always shared with the composers or songwriters who created the work.

A wholly owned subsidiary of NMPA, The Harry Fox Agency, Inc. ("Fox"), is agent for the class members in this action. Fox licenses musical compositions for use in recordings on behalf of more than 7800 music publishers, including NMPA members, and provides accounting and other services in connection with these licenses, including periodic audits of record companies to monitor the payment of royalties by record companies to music publishers. It thus plays a major role in assisting music publishers to enforce their copyrights.

This case is of vital interest to the publishers represented by NMPA and Fox. It involves issues common to all music publishers, and will directly affect the enforceability of approximately two million currently outstanding licenses issued by music publishers. The

---

1/ There are two other music publishers' trade associations in the United States: The Music Publishers' Association of the United States, whose members publish educational and concert music, and the Church Music Publishers' Association.

licenses potentially at risk constitute the vast majority of currently outstanding licenses for the use of copyrighted musical compositions in recordings.

The case also threatens to transform future business practices in a way which will make it more difficult to utilize the compulsory license, thus disadvantaging both music publishers and record companies.

NMPA supports the grant of the petition for certiorari for the reasons stated in the petition. It submits this brief in support to emphasize the importance of the issue to the music publishing industry, and describe the impact of the Ninth Circuit's decision on that industry.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision will significantly undercut the ability of music publishers to enforce their copyrights. It does this by depriving publishers of the powerful copyright infringement remedies established by Congress for breaches of the compulsory license when publishers and record companies agree to vary the terms of the compulsory license. These copyright infringement remedies have long deterred record companies from defaulting in their obligations to pay royalties, and encouraged the settlement of royalty disputes when defaults are discovered.

Approximately two million currently outstanding licenses utilize forms, like those involved in this case, which vary the terms of the compulsory license. These licenses were issued on the assumption that they were compulsory licenses, enforceable by the copyright infringement remedies. This assumption has been supported by longstanding judicial precedent. These licenses constitute the vast majority of licenses to record musical compositions issued to record companies over the past several decades, as these forms have been routinely used by most music publishers.

The Ninth Circuit's decision threatens to undermine the enforceability of these licenses, and to reshape future business practices in

the music industry. NMPA urges this Court to grant certiorari to review that decision.

ARGUMENT

The compulsory license provision of the Copyright Act (17 U.S.C. § 115) establishes the basic framework under which composers, lyricists and their publishers do business with the record companies which exploit their works. While a publisher can agree to license a previously recorded composition to a record company, it cannot practically refuse to do so, for if it does, the record company can nevertheless use the composition by complying with the terms of the compulsory license provision of the Act.

Rather than resist the inevitable, and force record companies to furnish the formal notice required by section 115, most music publishers routinely agree to issue licenses when they receive a request indicating that a record company desires to distribute a recording of the composition. These licenses specifically preserve and incorporate the terms of the compulsory license, while at the same time making certain accommodations for the convenience of the record company. In addition to relieving the record company from serving the formal notice, the industry standard license agreement also varies the terms of the statutory compulsory license by slightly relaxing the accounting period, from monthly to quarterly. In some cases, publishers are also willing to reduce the royalty rate below the statutory rate. These licenses are often referred to as written variations of the compulsory license.

While publishers generally accede to these requests, they insist that record companies acknowledge by signing the form of license (1) that the licenses they obtain are compulsory licenses, and (2) that if the record company defaults, the publisher is entitled to the copyright infringement remedies available under section 115. That section provides that if a record company defaults in the payment of royalties, and fails to remedy that default within the 30 day period provided by law, the publisher can recover either actual damages and profits, or statu-

tory damages ranging from $500 to $100,000 per infringement.[3/] The publisher is also entitled to recover attorneys' fees and costs, and obtain injunctive relief. *See* 17 U.S.C. §§ 115, 501–505.

Prior to the Ninth Circuit's decision, an unbroken line of court decisions, beginning with Judge Weinfeld's decision in *Joy Music, Inc.* v. *Seeco Records, Inc.*, 166 F. Supp. 549 (S.D.N.Y. 1958), held that minor variations in the terms of the compulsory license did not transform the license into a private agreement and deprive publishers of their right to the statutory remedies available for failures to comply with the terms of the compulsory license.[4/]

NMPA's subsidiary, Fox, is responsible for licensing musical compositions that account for approximately 72% of the recordings distributed in the United States.[5/] Fox also has the principal role in monitoring and enforcing compliance with these licenses. Almost all of these licenses are written variations of the compulsory license on the industry standard form. They are virtually identical to the licenses which are the subject of this case.

Fox's records show that it issued 957,412 such licenses during the period 1972–1990. A total of approximately two million such licenses have been issued, constituting the vast majority of currently outstanding licenses for the recording of copyrighted musical compositions. These licenses were issued with the understanding, in light of their express language, the unanimous judicial precedent, and Congressional awareness of the practice,[6/] that they could be enforced, if nec-

---

3/ Under 17 U.S.C. § 115(c)(2), "termination renders either the making or the distribution . . . of all phonorecords for which the royalty has not been paid, actionable as acts of infringement . . . ."

4/ The authorities which have universally endorsed these principles are discussed in the Petition for a Writ of Certiorari filed by Peer International Corporation, at 9–13.

5/ Most of the remaining licenses are issued "in-house," by publishing companies to affiliated record companies. Fewer than 1% of licenses issued are obtained by resort to the formal statutory procedures.

6/ See the Petition for a Writ of Certiorari filed by Peer International Corporation, at 13 n.6, 15 n.9.

essary, by resort to the statutory remedies. Without these remedies, the publishers' ability to enforce their copyrights would be severely undermined.

The task of enforcing these licenses, and ensuring that record companies comply with their terms, is an enormous one. Fox conducts audits on all major record companies every two years. As of December 31, 1990, approximately 150 such audits were in progress. These audits frequently uncover defaults in the payment of royalties. In 1990 alone, approximately $25 million in unpaid and delinquent royalties was collected pursuant to Fox's Audit Recovery Program.

Without the powerful copyright infringement remedies of the Copyright Act, the task of collecting these deficiencies would become overwhelming. These remedies are a vital incentive encouraging the payment of royalties and settlement of royalty disputes arising out of audits, without litigation. As it is, music publishers represented by Fox are forced to send notices of termination corresponding to over 2000 copyrighted compositions each year to enforce royalty obligations. Most disputes are resolved before litigation, and Fox publisher principals bring an average of two lawsuits each year to enforce these obligations. Both numbers, and particularly the number of litigated cases, would increase dramatically if the statutory remedies were unavailable. In addition to burdening the court system, this result would particularly disadvantage smaller publishers and songwriters, whose royalties on a work might not justify the litigation costs necessary to collect those royalties.

It is also reasonable to anticipate that the Ninth Circuit's decision will significantly alter future business practices in the music industry, burdening the industry and impeding musical creativity. The decision subjects music publishers to a difficult dilemma. They can either (1) insist on strict compliance with the terms of the compulsory license, thereby preserving their right to copyright infringement remedies, but making the compulsory license more difficult to use and possibly deterring usage of their copyrighted works, or (2) agree to the standard mutually convenient variations, which, at least in the Ninth

Circuit, will result in a waiver of their right to recover copyright infringement damages for a record company's failure to pay royalties and cure that default within the 30-day notice period.

The threat to musical creativity here is real. One record company has stated that if publishers were to insist on payment on statutory terms, an "intolerable burden" would be put on record companies. *Copyright Law Revision: Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 526 (1967) (Statement of Isabella Marks, Assistant Secretary, Decca Records). Publishers, on the other hand, will not lightly forego the statutory remedies which make their licenses practically enforceable. The decision thus threatens to deter usage of copyrighted musical compositions and impede musical creativity.

There is no reason to subject publishers to this dilemma. Congress was well aware of industry practice when it passed the Copyright Act of 1976, and the unanimous and heretofore unchallenged judicial precedent sensibly recognized that it made no sense to deny music industry participants a certain degree of flexibility in fashioning their relationships. The Ninth Circuit's decision departs from this long-established precedent, and threatens immediate and substantial harm to an important industry. We therefore urge the Court to take review and reverse the decision of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, NMPA respectfully requests that the petition for certiorari be granted.

Dated February 1991

Respectfully submitted,

CHARLES J. SANDERS
(Counsel of Record)
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.
205 East 42nd Street
New York, New York 10017
(212) 370–5330

Attorney for National Music Publishers' Association, Inc.